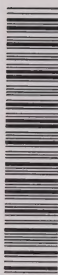


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**SMALL BUSINESS ADVOCACY
REPORT NO. 4**

**AN ADVANCE NOTICE SYSTEM
FOR PROPOSED REGULATORY
INITIATIVES**

September, 1985

**MINISTRY OF INDUSTRY,
TRADE AND
TECHNOLOGY
ONTARIO**





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SMALL BUSINESS ADVOCACY REPORT NO. 4

AN ADVANCE NOTICE SYSTEM FOR PROPOSED REGULATORY INITIATIVES

September, 1985

Small Business Branch
Small Business, Service Industries
and Capital Projects Division
Ministry of Industry, Trade and
Technology

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GLOSSARY

ADVANCE NOTICE SYSTEM (ANS) - a system to provide advance notice of regulatory initiatives to the public. (This term is used by The Economic Council of Canada, the Federal Special Committee on Regulatory Reform, and The Nova Scotia Premier's Task Force on Deregulation and Paperburden.) The purpose of an ANS is to provide the public with an opportunity to learn about perspective initiatives and to be able to comment on them.

AGENDA - a publication which collects the advance notices at a particular time of all the departments, ministries or agencies in one place.

FEDERAL AGENDA - a term used as a short form for Federal Regulatory Agenda of Canada.

FEDERAL REGISTER - the American counterpart to the Ontario and Canada Gazette. Initial notice of proposed regulations is published in the Federal Register.

GAZETTE - A weekly government publication reporting government actions and notices.

INTERESTED PARTIES - members of both public and private sectors who are or could be affected by a government initiative.

NOTICE AND COMMENT - a term used to designate an advance notice system. (This term is used by the Ontario Standing Committee on Regulations and Other Statutory Instruments).

REGULATORY INITIATIVE - "any activity or exercise of federal authority that might lead to the creation, modification, or elimination of regulation, or that might affect a decision on the quantity or quality of a regulatory action the department might take." (The Federal Regulatory Agenda, May 25, 1985, p4)

RULE MAKING - the term used in the Administrative Procedures Act 5 U.S.C. 553 to designate an ANS.

U.S. AGENDA - the Agenda for U.S. published semi-annually as Part II of the Federal Register (also called the Unified Agenda of Federal Regulations).

EXECUTIVE SUMMARY

The purpose of this paper is to propose that Ontario establish an Advance Notice System (ANS) for giving the public early warning of proposed regulatory initiatives.

In any improvement of the regulatory process, there are seven principles to be followed in order to achieve the optimal balance between protection to society and allowance for an individual's rights and freedoms.

These principles are:

- . Informed decision making¹

The decision makers must be provided with all the necessary facts about the possible effects of the regulation and must be able to apply this knowledge in a well reasoned way.

- . Accountability¹

It must be possible to identify elected official who are responsible and accountable to the public for each regulatory action.

- . Procedural fairness¹

Established, consistently applied, and generally recognized procedures must be in place.

- . Openness¹

Information relating to any regulatory initiative should be available to the public to facilitate interested parties in expressing their concerns prior to any final decision about the initiative. Reasons for decisions should be made public.

- . Administrative ease

Regulations must not impose unreasonable costs in time and manageability on the administrators.

- . Net cost benefits

Regulations must result in greater benefits than costs. These costs and benefits should take into account both monetary and non-monetary elements.

. Participatory democracy


Because of the complexity and specialization of modern government, the elected representative may be very distant from the actual decision-making, thus rendering representative democracy less effective. There should be more participation in the decision-making by those who will be affected by it.

This paper applies these principles to recommend an ANS for Ontario. It then examines and gives recommendations about various policy options or decisions to be made in the design and implementation of such an ANS. These concern structure, authorization, scope of regulatory coverage, participants, content of the notice, form of the notice, frequency, distribution, administration, enforcement, design of the ANS and type of comment.

Throughout the analysis, reference is made to the U.S. and federal Canadian ANS's. These ANS's are explained in some detail.

In order to understand the current situation in Ontario, there is a historical overview of events in Ontario relating to the study of an ANS. There is also an explanation of the current regulatory process in Ontario with comments on the weaknesses therein.

The basic theme throughout the paper is that in order to promote participation by interested parties in decision-making, an ANS is necessary. Such a system encourages the public perception of a government which is "open, compassionate and competent."²



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MINISTRY OF INDUSTRY, TRADE AND TECHNOLOGY
PROPOSAL FOR AN ADVANCE NOTICE SYSTEM IN
ONTARIO FOR PROPOSED REGULATORY INITIATIVES

1. INTRODUCTION

"We will open new avenues to public participation and close old ones to arbitrary decisions...

...We face many pressing needs. One that touches upon all others is the need to make Ontario's government open, compassionate and competent - like its people." (David R. Peterson, Premier of Ontario, July 2, 1985)

One very effective way to meet these important goals is to establish an Advance Notice System (ANS) for proposed regulatory initiatives. An ANS is a system by which the Government provides early notice of proposed or contemplated regulation. The notice permits interested parties in both private and other public sectors to voice their concerns and opinions about the proposed regulatory initiative prior to its adoption.

This early opportunity to comment is important because:

- . It provides an additional avenue for public participation, thus fostering a more democratic approach to government.

- . It encourages a more positive public perception of the government as being more "open, compassionate and competent".
- . It increases the effectiveness of the regulatory process by resulting in better accepted, more refined and less burdensome regulation.
- . It improves efficiency by providing the decision-makers with often otherwise unavailable or prohibitively expensive expert advice and additional data.
- . It addresses the problem of intragovernmental overlap by compiling in one place the various responsibilities and subject matters of all participating departments and agencies.
- . It provides time for the private sector to adjust and to plan for the new regulations.

In summary, an ANS is an excellent means of providing a regulatory process which is more responsive to the needs of its constituents.

II. THE CURRENT REGULATORY PROCESS IN ONTARIO

Regulations may be passed in one of three ways in Ontario as determined by the enabling statute. Regulations are approved by Lieutenant Governor in Council, the respective Minister, or in rare cases, the head of the Agency.

When the enabling statute requires approval by the Lieutenant Governor in Council, the procedures are:

- 1) The programme administrators develop, in consultation with the ministry's legal advisers, a policy submission detailing the need for the regulation and the financial impact of the regulation.
- 2) The Policy submission is reviewed at various levels within the ministry to ensure that the proposed policy is compatible with other programmes and policies of the ministry.
- 3) The policy submission, if approved during the internal review procedure, is submitted to the minister for approval.
- 4) If approved by the Minister, the ministry's legal advisers may prepare an initial draft of the regulation.
- 5) Depending on the nature of the proposed regulation, the policy submission and the draft regulation, if any, may be,
 - a) circulated to other ministries for comment, if the regulation will affect programmes of other ministries;
 - b) circulated outside the government for comment. While there is no general legal requirement for pre-making 'notice and comment review', it is not uncommon for ministries to obtain outside comment before making a regulation...

- c) submitted to Management Board of Cabinet for approval if the regulation affects provincial revenues or expenditures.
- 6) At this stage, most ministries complete a draft of the regulation and submit it to the Registrar of Regulations for approval. Some ministries submit only the policy statement to the Registrar and rely on his office to do all drafting.
- 7) If the regulation is approved by the Registrar, the ministry submits the regulation to Cabinet Office where it is placed on the agenda for the next meeting of the Cabinet Committee on Regulations. The chairman of this Committee is a Minister without Portfolio. The Parliamentary Assistant to each Minister is a member of the Committee... The review is a detailed policy review and officials from the ministry attend to explain the proposed regulation. Counsel from the Office of the Registrar of Regulations attend as counsel to the committee. If the Committee is not satisfied that the proposed regulation reflects over-all government policy or that the proposal is politically unwise or that there should be consultation with outside groups or the public, the regulation may be turned back to the ministry for further work or the Committee may "red-flag" the regulation for detailed consideration by Cabinet.
- 8) If the regulation is approved it goes to the full Cabinet for consideration at the next Cabinet meeting. Cabinet may turn back a regulation to the ministry for any of the reasons that the committee might turn back a regulation.
- 9) Assuming the regulation is approved by Cabinet, the regulation is sent to the Lieutenant Governor for signature.
- 10) The regulation has now been made and is usually filed with the Registrar of Regulations within a few days. All regulations that are filed are published in the Ontario Gazette as required by the Regulations Act."¹

Regulations made by a Minister go through steps 1) through 6) and then 10). Regulations made by a head of the Agency only go through steps 1) and 10).

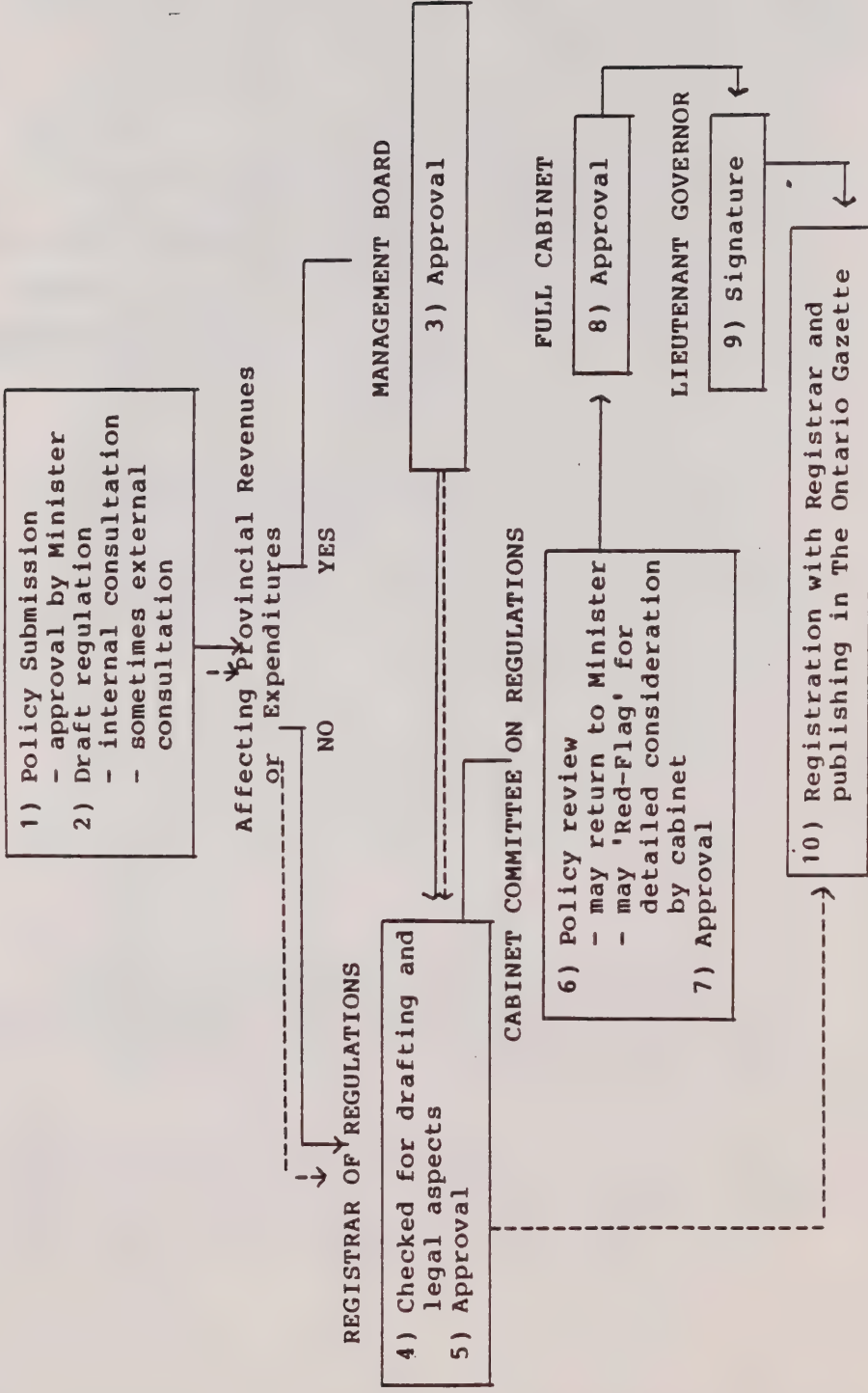
'Notice and comment' is a term often used to indicate an ANS. There are three types of 'notice and comment review' currently operating in Ontario. They are as follows:

- 1) A ministry or agency may adhere to a statutory 'notice and comment' requirement as set out in the enabling legislation (e.g. the Occupational Health and Safety Act, RSO 1980 c. 321 s. 22, Planning Act, RSO 1983 c. 1 s. 17, and Industrial Standards Act, RSO 1980 c. 216 s. 7)²
- 2) A ministry or agency may follow a voluntary practice of publishing notice of proposed regulations and inviting comment (e.g. Ontario Securities Commission).
- 3) A ministry or agency may conduct voluntary informal discussions with specifically invited parties.

There are also examples of ministries and agencies passing regulations with apparently no prior notice and comment procedures at all.

REGULATORY PROCESS IN ONTARIO

MINISTRY



— Regulation made by Lieutenant Governor in Council
---- Regulation made with Minister approval only

Note: Some regulations may not require either Lieutenant Governor in Council nor Minister approval
Based on information in "Rule-Making in Ontario", Donald L. Revell (1982), 16 Law Society of Upper
Canada Gazette 350-374

III. WEAKNESSES OF THE ONTARIO SYSTEM DUE TO AN ABSENCE OF ANS

There is no consistent nor common system of advance notice of proposed regulations currently operating in Ontario. As a result, a network of communication channels has developed between interested parties and the various ministries and agencies. The resulting access depends strongly on nurturing "connections".

This haphazard basis for input to decision-making can result in under or non-representation of a significant group in the decision-making process. The neglect of a particular group's input may be unintentional by the ministry or agency. Sometimes a group may be ignored because impact of the regulation on that group was simply not previously identified. A regulation may also have unintended effects.

The following two examples show some specific problems which can occur where there is no ANS.

- . In 1983, the Ontario Trucking Association noted a serious abuse and safety problem which was caused because no prior notice was given to the trucking industry by the Ministry of Transportation and Communications of a change to a regulation relating to the use of farm plates.

- . In February 1985, the Liquor Licensing Board of Ontario attempted to impose quotas for draught beer on taverns. There was a great furor by tavern-owners and the decision was reversed after much publicity and upset by all parties.

More generally, the lack of an ANS has resulted in the following weaknesses in the present Ontario regulatory process.

- . Government is seen to be operating in a less open and less even-handed manner. Often it seems as if only through nurtured routes of communication can interested parties reach the decision-makers.
- . There is an increased incidence of complaints about compliance costs when regulations are passed without prior consideration of the full effects of the regulation.
- . There is less effective accountability for regulatory actions because a ministry or agency is accountable to the public after the fact rather than before.

- . Valuable sources of free data and expertise are overlooked when government does not provide interested parties with a means of consultation; and
- . There is a possibility of litigation generated by regulations passed without advance notice.

The weaknesses noted above are compounded when regulating the small business sector. This is because this sector is more diversified and less individually powerful than most other sectors. The emergence of lobby groups such as the Canadian Federation of Independent Business and the Canadian Organization of Small Business are providing some organized representation. Still the problems of underfunding and understaffing prevent these groups from accomplishing full scale input to all levels of government. With limited resources available, it is an impossible task for these groups to cover all areas of potential government initiatives.

An effective ANS would considerably ease the pressure on interest groups to maintain active monitoring to determine each new possible initiative and would allow the groups more time to concentrate on meaningful responses to proposed government initiatives.

IV. EVALUATION OF ANS'S PLACE IN OTHER JURISDICTIONS

A. ANS in Canada

1. History

Treasury Board President Herb Gray's announcement on January 11, 1983 that the Federal Government would publish a semi-annual Regulatory Agenda beginning in May 1983 was the response to much research and recommendations to implement a formal ANS in Canada.

Significant study of all areas of regulatory reform had been underway from 1969 and had intensified during 1978-1981. Recommendations for an ANS of one kind or another had been received from the MacGuigan Committee in 1969, the Economic Council of Canada in 1979, the Peterson Committee in 1980, and the Standing Joint Committee on Regulations and Other Statutory Instruments in 1980.

Finally, on November 18, 1982 Cabinet directed Treasury Board to coordinate the publication of the Federal Regulatory Agenda.

In addition to this general ANS, there has been a trend towards specifically mandated 'notice and comment' procedures in individual regulations, examples are: The Broadcasting Act, R.S.C. 1970 c.B-11 s.16(2), Grain Futures Act, R.S.C. 1970 c.G-17 s.5 and the Motor Vehicle Safety Act, R.S.C. 1970 c. 26 s.9 (1st Supp.).

2. Federal Regulatory Agenda

a. Description:

The federal government presently publishes a Regulatory Agenda semi-annually which provides notices of proposed regulatory initiatives for fifteen departments and agencies that pass approximately 90% of federal regulations .¹

The Agenda is designed to "provide enough information so that readers can decide whether or not they wish to learn more or become involved in the consideration and development of the initiative."²

Regulation is defined in the broadest sense as being "the imposition of rules on the private sector for the purpose of modifying behaviour."³

There is a Caveat and Exemption section that gives broad discretion to the ministers regarding inclusion of specific entries in their department's agendas.

The Agenda is published as a semi-annual supplement to the Canada Gazette and as such must conform to Gazette requirements. Unlike its American counterpart, it contains a complete index to help readers locate subjects of concern.

Until funding for the federal computer data base Cantel was discontinued in December 1984, the Agenda was also available electronically through Telidon. The menu-driven information was accessible in four ways: unique agenda entry number, organization chart, department name, or subject key-word.

Since funding was discontinued, Infomart, a private company, has been including the Agenda as part of its "Portfolio" business and government information service. As of August 7, 1985 it had removed accessibility by unique entry number, organization chart and subject key-word, thus leaving a relatively inaccessible data base. Reinstatement of the other entry systems, especially key-word, is presently being recommended by Treasury Board.

In 1983, there were 208 subscribers to the Federal Agenda and 1,562 subscribers to individual department agendas. The electronic Agenda currently has approximately 2,000 "hits" in each of May and November and approximately 1,000 "hits" in each of the other months.

b. Costs:

The actual costs per year incurred by the Canada Gazette publishing the Agenda are approximately \$200,000. This covers printing, type-setting, paper and other costs. Off-setting this amount is approximately \$40,000 in revenue raised through sales of the Agenda and its extracts. The Regulatory Agenda as a supplement to the Canada Gazette is sold for \$25 per year. The subscription cost of an individual department agenda is \$5 per year. In addition the labour costs of person years is incurred in the compilation of the agenda by the Gazette editorial staff, the individual departments, and the Office of Regulatory Reform. This labour comes to approximately 1.75 persons per year. (Original set-up labour was .5 person for one year.)

Much of the actual \$200,000 cost relates to the strict conformity with Gazette standards with respect to paper quality, type set and other needs not directly relating to Agenda requirements.

The costs for establishing and maintaining the Agenda on a computer data base would be significantly lower. As a quotation from Infomart indicated, for a one-time charge of \$20,005 and a monthly charge of \$2,872, the Agenda could be made available on a database, specifically designed for that purpose.

The Office of Regulatory Reform has also received an offer from a private sector publishing company to produce and market the Federal Agenda. In return for receiving the completed manuscript, the company offered to pay the Federal government a 7 1/2 per cent royalty. The company would charge subscribers \$50 per year or \$20 per issue. This method of publishing the Agenda would cut Government costs dramatically since, for example, Gazette standards would not have to be met.

c. Evaluation:

The federal Agenda has been very well received. When the Honourable Herb Gray, then President of the Treasury Board, announced its birth, the response from the private sector was very enthusiastic. Since then, the response has continued to be positive.

Some examples of this positive attitude are:

- . The Retail Council of Canada noted that the Council was alerted to twenty-six significant items in the last Federal Agenda. It felt that the format of the Agenda was good and that the socio-economic impact analysis was useful.
- . The Ontario Trucking Association stated that by reading the Federal Agenda, the Association was alerted to future actions with respect to equal pay for work of equal value. Because of this warning, the Association was able to begin research on the issues as they affected its own constituency on a timely basis. As well, the advance notice gave significance to an issue already recognized as important by Association staff but not yet appreciated by the membership at large.
- . The general feedback to the Office of Regulatory Reform is that the Agenda is very well received in both public and private sectors. Most of the departments and agencies have found the Agenda useful as a planning and management tool. The private sector strongly supports the program and,

in fact, would like to see it extended to all departments and agencies involved in regulation-making. In particular, there is support for having the departments of National Revenue - Taxation and Finance participate.

- . The Law Reform Commission of Canada, in a Draft report to Parliament, stated in ss.56-57

"Indeed, the very existence of the regulatory agenda seems to have raised participatory expectations and encouraged regulation-makers to take into consideration the opinions of the interested public".

In addition to the above evaluations of the Agenda, a more formal assessment is presently being undertaken by the Ministerial Task Force on Program Review chaired by the Honourable Erik Nielsen. The results of this review are expected in September, 1985. In the December 10, 1984 press release announcing this review, Treasury Board President Robert de Cotret stated,

"It is clear from the comments of private sector representatives that the Agendas are widely perceived as an effective way to promote public awareness of the regulatory process. The question remains, however, of how to achieve that benefit at least cost."

It appears that none of the federal Agenda evaluations have actually compared regulations passed to those published earlier in the Agenda to determine:

- . what percentage of passed regulations were given advance notice in the Agenda;
- . what percentage of passed regulations given advance notice in the Agenda were amended because of public input to the process; and
- . whether those passed regulations not given advance notice in the Agenda were reasonably exempted in accordance to the issues guidelines.

It is arguable that without such a statistical evaluation, the federal Agenda model cannot be declared the optimal ANS. The counter-argument is that the key factor of assessment should be the public's perception rather than statistics on results.

In any event, the evaluations done reaffirm the benefit in having a formal ANS. What is still uncertain is whether the Regulatory Agenda as a supplement to the Gazette is the most appropriate vehicle for the ANS.

B The ANS in United States

1. History:

The American ANS is set out in three different documents: Administrative Procedures Act, 5 U.S.C. 553, Executive Order 12291, and The Regulatory Flexibility Act (5 U.S.C. 601-612).

a. Administrative Procedures Act, 5 U.S.C. 553

The Administrative Procedures Act requires that there be a general notice of proposed rule-making prior to certain regulations being passed. The notice is published in the Federal Registrar, a weekly publication similar to the Ontario Gazette.

b. The Regulatory Flexibility Act

In September, 1980, The Regulatory Flexibility Act (RFA) was passed. This Act "puts the burden on the government to review all regulations to ensure that, while accomplishing their intended purposes, they do not unduly inhibit the ability of small entities to compete."¹

The Act requires that in April and October of each year, all proposed rules which have "A significant economic impact on a substantial number of small entities"² be published in a semi-annual Federal Regulatory Agenda. A "rule" means any rule for which the agency publishes a general notice of proposed rule making pursuant to 5 U.S.A. 553 mentioned earlier.

c. Executive Order 12291

On February 17, 1981 President Reagan issued Executive Order 12291. Under this Order, a Regulatory Agenda is to be published October and April of each year. The Agenda must include proposed regulations that an agency has issued or expects to issue. This requirement has been combined with RFA to result in a unified semi-annual Federal Agenda.

This order establishes a special group of regulatory initiatives called 'major rules' which require a formal Regulatory Impact Analyses (RIA) and disclosure thereof in the Agenda.

Thus there are three levels of disclosure of proposed rules - general notice, notice of 'major rules', and notice of small entity impact.

2. Unified Agenda of Federal Regulations

a. Description:

The name of the semi-annual publication is "Unified Agenda of Federal Regulations" hereafter called U.S. Federal Agenda. The paper publication consists of approximately 1100 pages arranged by alphabetical order of departments and agencies. There is no subject index. The book is considered part of the Federal Register (comparable to the Ontario Gazette).

The Agenda is also available on computer for internal use only.³ It is available as a full text search and retrieval system. In other words, one can search any combination of data elements.

b. Evaluation:

The Regulatory Information Service Center which publishes the U.S. Federal Agenda has conducted regular surveys of its readers. The results of its June 1981 survey show 96.4% of respondents found the Agenda useful or very useful. One of the comments stressed the excellence of the document as an information source for small business.

Based on a review of current literature⁴ the existence of the American 'notice and comment' is not a contentious issue. The main issues are refinements of the 'notice and comment', cost benefit analysis, and

V. DESCRIPTION OF ONTARIO'S HISTORY
WITH RESPECT TO ANS

Proposals for an ANS for proposed regulatory initiatives have not yet met with success in Ontario.

. Royal Commission Inquiry into Civil Rights,
1968

In 1968, The Royal Commission Inquiry into Civil Rights (headed by the Honourable J.C. McRuer, Commissioner) studied "Prior Publication" of regulations and concluded that such publication was not required

"We have concluded that advance publication of regulations before they are made is not required in Ontario as a necessary safeguard of the rights of individuals who may be affected. Compulsory antecedent publication and consultation would cause unnecessary delay and merely duplicate the time already spent in informal consultation."¹

. Commission on Freedom of Information and
Individual Privacy, 1980

The question of an ANS for Ontario did not receive much formal attention again until 1980 when the Report of the Commission on Freedom of Information and Individual Privacy, Public Government for Private People addressed it. As part of the research of the Commission, Professor David Mullan prepared a paper for the Commission entitled "Rule-Making Hearings: A General Statute for Ontario?" This over 200 page research paper is a monumental contribution to the study of an ANS.

Professor Mullan's recommendation was:

"...it is time for the enactment in the province of Ontario of a general 'notice and comment' requirement after the basic federal model in the United States. The evidence demonstrates that such a process rather than creating additional regulatory inefficiency, has a tendency to encourage the development of better rules and policies. At a time when increasing attention is being paid to the functioning of the regulatory process in this province, such a device should commend itself to those concerned with improving our system of government."²

The Commission chose not to follow Professor Mullan's recommendation. Instead it recommended:

- "1. We recommend that governmental institutions engaged in rule-making activity be encouraged to adopt notice and comment procedures so as to facilitate public discussion and informed comment on particular rules proposed for adoption.
2. Consideration should be given to the adoption of provisions requiring notice and comment opportunities in specific statutes which confer rule-making powers on governmental institutions."³

The Commission rejected a blanket 'notice and comment' procedure because it felt that the issue was only tangentially connected to its inquiry and that a more thorough examination of the question was required.

. Standing Committee on Regulations and Other
Statutory Instruments, 1983

The Standing Committee on Regulations and Other Statutory Instruments addressed the issue of an ANS for Ontario in its First Report 1983. The Committee reviewed some information about ANS and interviewed ten individuals. The majority of the interviewed individuals were Government employees.

The Committee's conclusion on an ANS for Ontario was as follows:

"The committee, having perused the extensive literature on the subject and heard the testimony of the knowledgeable persons who appeared before us, now recommend to the House that in our opinion the practices with respect to Notice and Comment presently in effect in Ontario continue but with more emphasis upon incorporating suitable procedures in appropriate Acts."⁴

The "perusal" of "extensive literature" did not include The Economic Council of Canada's Interim Report Reforming Regulation of November 1979 nor the Report of The Special Committee on Regulatory Reform (the Peterson Committee Report) of December 1980.

The Committee referred to articles in The New York Times and The Congressional Quarterly about constant criticism in the U.S. for "what are called regulatory excesses of one kind to another."⁵ The inference was that broad 'notice and comment' procedures were therefore undesirable.

It must be noted that the articles contain no negative reference to 'notice and comment' nor any criticism of its existence. The actual criticism in the articles was directed towards the need for more cost-benefit analysis and review of regulations by Congressional committees.

. Standing Committee on Regulation and Other
Statutory Instruments, 1984

In 1984, the Standing Committee on Regulations and Statutory Instruments again addressed the issue of 'notice and comment' in its First Report. The Committee concluded that it was too early to make an assessment of the Federal Regulatory Agenda (published the previous May and November). It stated that the main question in assessment was "Do its advantages outweigh its costs?"⁶

. Present

Ontario has continued to maintain its status quo of no ANS unless specified in a particular statute.

The main studies addressing an ANS were done by bodies either having regulatory reform as only a minor aspect of their mandate (Royal Commission Inquiry into Civil Rights and Commission on Freedom of Information and Individual Privacy) or inadequately prepared (Standing Committee on Regulations and other Statutory instruments).

Pressure is still being applied to the Ontario Government to implement an ANS. Briefs to the current Government from the Canadian Organization of Small Business and the Ontario Chamber of Commerce reflect the concerns of the private sector and request an ANS for Ontario.

VI. IDENTIFICATION OF PRINCIPLES TO BE CONSIDERED IN
ANY IMPROVEMENT OF THE REGULATORY PROCESS

Regulations, like legislation, provide protection to society at the same time as allowing for an individual's freedom and liberty. It is necessary to strike a proper balance between the rights and freedoms of the individual and the smooth running of society.

Seven principles are proposed in order to achieve the most effective and meaningful balance in regulating.

These are:

. Informed Decision Making -

The decision makers must have the necessary facts about the costs and benefits (including non-monetary) resulting from the regulation and must be able to apply this knowledge in a well reasoned way.¹

. Accountability -

It must be possible to identify elected officials who are responsible and accountable to the public for the regulatory action.¹

. Procedural fairness -

There should be established procedures, general awareness of those procedures and consistent application of them.¹

. Openness -

Interested parties should be aware of possible regulatory initiatives affecting them and they should be able to express their concerns prior to the decision. Information relating to the decision should be publicly available. Reasons for decisions should be made public.¹

. Administrative ease -

Regulations should not impose unreasonable costs in time and manageability on the administrators.

. Net Cost benefit -

Each regulation should result in greater benefits than costs. These costs and benefits should take into account both monetary and non-monetary elements.

. Participatory democracy -

There should be participation in the decision-making by those who will be affected by it.

Representative democracy may not be adequate in the modern context where highly specialized and complex decision-making is required. The elected representative may be too distant from the actual decision-making and may not have the expertise to provide meaningful representation.

VII. POLICY OPTIONS AND RECOMMENDATIONS

The following is a list of decisions to be made in designing and implementing an ANS for Ontario:

- A Existence -
Should there be a formal ANS in Ontario?

- B Structure -
Should the ANS be centralized or should departments and agencies develop their own ANS?

- C Authorization -
Should authorization for an ANS be made by statute or cabinet directive or combination of both?

- D Scope of regulatory coverage -
What definition of regulation or regulatory initiative should be used? What exemptions should be permitted?

- E Participants -
Which ministries and agencies should be required to adhere to the ANS?

F Content of the notice -

Should the notice contain a description of the ministry, description of the initiative, contact person, cost benefit analysis, completed matters, index, etc.?

G Form of the notice -

Should it be as a supplement to the Gazette, a separate publication or part of a computer information service?

H Frequency -

Should notice be given as required or distributed at regular intervals, say semi-annually?

I Distribution and Marketing -

To whom and at what price should notice be provided?

J Administration -

Who should administer and monitor the notice?

K Enforcement -

What enforcement techniques should be used to ensure compliance?

L Design of the ANS -

Should ministries and agencies be directly involved in the planning of Ontario's ANS?

M Type of Comment -

Should comment be by way of an oral hearing or written submission?

A. Existence

Both Canada and the U.S. have considered an ANS an important step in improving their regulatory processes.

The policy options are:

1. Establish a formal ANS in Ontario.

Advantages:

- . There would be more informed decision-making because of the additional input available.
- . Accountability is improved since an ANS provides the important first step of setting out who is accountable for what.
- . Procedural fairness is enhanced because an ANS ensures an opportunity to be heard prior to the adaption of any disclosed regulatory initiative.

- . Openness is better guaranteed since interested parties can become easily aware of possible regulatory initiatives that could affect them.
- . Better accepted, more refined and less burdensome regulations would result. This would make administration of the regulations easier.
- . There would be an additional avenue for public participation in government decision-making, thus fostering the principle of participatory democracy.
- . The private sector would be better able to adjust and plan for new regulations.
- . There would be a more positive public perception of the government.
- . The actual decision-making might be less expensive because of the free data and expertise provided from the public.

Disadvantages:

- . There would be a monetary cost of both labour and production to set up and maintain a formal ANS.
- . There might be more ad hoc decision-making by ministries or agencies to avoid the formal procedural requirements for an actual regulation.

- . There might be more regulatory capture of the regulating entity by the groups being regulated.

2. Maintain the status quo:

Advantages:

- . The present informal procedures of involving interested parties in decision-making are often effective.

Disadvantages:

- . There is dissatisfaction with the status quo as evidenced by various groups' submissions to the government.
- . Government is perceived as operating in a less open and less even-handed manner.
- . Valuable sources of free data and expertise are overlooked.
- . There is a possibility of litigation generated by regulations passed without advance notice.

RECOMMENDATION

1. ONTARIO SHOULD DEVELOP AND IMPLEMENT AN ADVANCE NOTICE SYSTEM (ANS) FOR PROPOSED REGULATORY INITIATIVES.

B. Structure

Both the U.S. and Canada have a centralized ANS rather than allowing individual departments and agencies to design and implement their own ANS's.

The policy options are:

1. Establish a centralized ANS in Ontario.

Advantages:

- . Uniformity of procedure, intent and format would make the notice more comprehensible to its readers.
- . Centralization of information would make the notice more accessible.
- . By having central research and experimentation, resources would be optimized and there would be less duplication and waste.
- . Compliance would be more easily monitored through a universal standard.

Disadvantages:

- . Flexibility would be reduced for individual ministries and agencies precluded from choosing their own methods for 'notice and comment'
- . The exceptions would be difficult to define in a manner which encompasses all situations.

2. Actively encourage departments and agencies to develop and implement their own ANS.

Advantages:

- . Flexibility would be increased for individual ministries and agencies to choose their own methods for 'notice and comment'.
- . There would be less outside intervention in a regulator's activities.

Disadvantages:

- . The voluntary and uncontrolled nature of the participation could mean lack of compliance.
- . It does not appear to work. Although this policy option was recommended in 1980 by the Commission on Freedom of Information and Individual Privacy and again in 1983 by The Standing Committee on Regulations and other Statutory Instruments. There is no increase in departments establishing their own ANS's.¹

It is necessary to have an ANS which is effective in alerting interested parties of proposed regulatory initiatives. A centralized ANS is the most accessible and reliable method of 'notice and comment'.

RECOMMENDATION

2. THE ANS SHOULD BE CENTRALIZED.

C. Authorization

The Regulatory Agenda of Canada is authorized by a Cabinet directive while the American form of 'notice and comment' is authorized by statute.

Whereas a directive is only discussed and approved by the party in power, a statute is a formally drafted document that must pass three readings in the Legislature and is open to contribution and criticism by all parties.

The Courts have held that statutes bind government whereas directives do not.² Once a statute has been passed the Courts will force the government to comply with it. This is not true of policy directives. Directives are not seen to have the force of law. Accordingly, government activity is more readily subject to litigation from the private sector where a statute is used as opposed to a directive.

In examining this issue, note must be taken of the difference in political milieu between Ontario (and Canada) versus United States. One of the features of the American political system is the ability of legislative bodies (including the President) to veto each other. These different bodies may be controlled by different political parties.

Statutory mandate is often necessary to prevent a veto or challenge to a desired initiative. In Ontario, the Cabinet, the chief source of government initiatives is made up of members of the one party in power. The principle of collegiality prevails in so far as all the Ministers are collectively responsible for each Cabinet decision. Thus in Ontario a Cabinet policy directive has a binding effect on the administrative bodies in a practical although not legal sense.

The policy options for authorization of an ANS in Ontario are:

1. Authorize an ANS by statute now.

Advantages:

- . By requiring three readings in the Legislature, the democratic process would be operating in the design and acceptance of the ANS, consistent with the ideals promoted by an ANS.

- . Accountability to the Legislature is assured at the outset.
- . Permanence is also better provided.

Disadvantages:

- . There would be a significant delay to the implementation of an ANS.
- . It would be difficult to fine-tune the ANS once in place.
- . There is greater possibility of litigation for perceived government non-compliance.
- . There may be less flexibility accorded to those ministries and agencies covered under the centralized statute.

2. Authorize an ANS by Cabinet directive

Advantages:

- . The policy could be implemented quickly.
- . There would be flexibility in designing the ANS not usually achieved in formal drafting of legislation.
- . There would be an immediate response to the political expediency of this issue.

- . There would be flexibility for future changes to the ANS.

Disadvantages:

- . There is a lack of permanence since the policy is maintained only at the whim of the party in power.
 - . The lack of authorization directly by the Legislature could be considered inconsistent with the democratic ideal it is promoting.
 - . There is no accountability to parliament for the design of the ANS.
3. At this time authorize an ANS by cabinet directive while committing to have a statute ready within a reasonable time limit (say three years).

Advantages:

- . The policy could be implemented quickly.
- . There would be flexibility in designing and fine-tuning the ANS.

- . There would be an immediate response to the political expediency of the issue.
- . There would be eventual permanence of the ANS.

Disadvantages:

- . The ANS would still be subject to amendment or even abolition as a result of changes in Cabinet policy or membership during the trial period.

Since it is important that the democratic ideal be promoted and because political expediency requires immediate implementation this compromise position could serve both ends.

RECOMMENDATION

3. THE GOVERNMENT SHOULD IMMEDIATELY AUTHORIZE AN ADVANCE NOTICE SYSTEM OF PROPOSED REGULATORY INITIATIVES BY CABINET DIRECTIVE WITH A COMMITMENT TO FORMALIZE SUCH A SYSTEM IN LEGISLATION BY THREE YEARS.

D. Scope of regulatory coverage

a. Definition of Regulatory Initiative

The Federal ANS covers a broad category of regulatory initiatives while the American ANS relates to a much narrower category of rules. The former includes interpretative rules and general statements of policy which are specifically excluded from the latter.

The policy options are:

1. Require advance notice of proposed regulations as defined narrowly thus excluding interpretation rules, general statement of policy and research projects.

Advantages:

- . Identification of a regulation is relatively simple.
- . The total number of entries included would be less and would therefore reduce costs.

Disadvantages:

- . Many items of potentially significant effect on interested parties might be excluded.

2. Require advance notice of proposed regulatory initiatives, as defined in the Federal Regulatory Agenda. These initiatives include interpretation rules, general statements of policy and research projects.

Advantages:

- . Interested parties would receive early warning of all government initiatives which could affect them at a time when their input would be most useful.
- . There would be a net cost benefit in that unworthy initiatives could be discontinued at an earlier stage.
- . The input from interested parties would facilitate ministries and agencies in obtaining useful and free expertise, data, and experience.
- . The exercise of summarizing and reporting the initiatives would be a useful planning tool to the individual ministry or agency.

Disadvantages:

- . The identification of such broad initiatives would be more difficult.

- . There would be additional costs incurred in compiling the information.

The central aim of an ANS is to facilitate participation of interested parties in government decision-making. The broad definition of regulation espoused by The Federal Regulatory Agenda as being "the imposition of rules on the private sector for the purpose of modifying behaviour"³ and the capture in the ANS of any initiatives which "might lead to the creation, modification, or elimination of regulation"⁴ best advance this aim.

RECOMMENDATION

4a. THE ONTARIO ANS SHOULD PROVIDE ADVANCE NOTICE OF PROPOSED REGULATORY INITIATIVES AS DEFINED IN THE FEDERAL REGULATORY AGENDA.

b. Exemptions

Both the Federal and American ANS's have exemptions from disclosure. Some exemptions are necessary to cover emergency, economic and national security, and intergovernmental relations. In applying these exemptions, some discretion is given to the ministry or agency head.

The policy options are:

1. Besides the usual exemptions relating to emergencies, military and foreign affairs, and internal operations, there should be another more open exemption giving much discretion to the individual ministry or agency head.

Advantages:

- . There may be certain initiatives which should be exempted from disclosure but which do not fall directly into another stated category.

Disadvantages:

- . The exemption might be overused.
2. There should be no wide exemption clause.

Advantages:

- . There would be less overuse of exemptions.

Disadvantages:

- . Ministries and agencies might resist an ANS without such discretion.

- . Unnecessary and inappropriate disclosure might be made of certain initiatives.
3. Under either policy option 1) or 2) above, there should be required "after-the-fact" disclosure as required in the United States by Executive Order 12291 s.8. Where an exemption is applied, as soon as it is feasible thereafter, notice should be made of that initiative with reasons for the exemption.

Advantages:

- . Ministries and agencies should be made accountable for the exercise of their discretion in applying exemptions from ANS.

Disadvantages:

- . Ministries and agencies might resist this intervention.

RECOMMENDATION

- 4b. THE ONTARIO ANS SHOULD INCLUDE AN EXEMPTION CLAUSE FOR MATTERS OF EMERGENCY, FEDERAL-PROVINCIAL OR INTERNATIONAL RELATIONS IMPLICATIONS AND ECONOMIC AND PROVINCIAL SECURITY. THERE SHOULD NOT BE WIDE DISCRETION GIVEN TO MINISTRIES AND AGENCIES IN APPLYING EXEMPTIONS.

4c. WHERE AN EXEMPTION FROM ADVANCE NOTICE IS APPLIED TO AN INITIATIVE, AS SOON AS IT IS FEASIBLE THEREAFTER, NOTICE SHOULD BE MADE OF THAT INITIATIVE AND REASONS SHOULD BE STATED WHY THERE WAS AN EXEMPTION.

E. Participants

The participating departments and agencies to the Federal Agenda account for approximately 90% of passed regulations. The notable exceptions are Department of Finance and Department of National Revenue (Taxation). ANS disclosure of tax initiatives is a problem both in the U.S. and in Canada where arguments such as the need for budgetary secrecy and the regulation aspect of tax incentives are advanced to resist such disclosure.

Policy options for Ontario are:

1. Require all regulating ministries and agencies to give advance notice of proposed regulatory initiatives.

Advantages:

- . The democratic ideal of across-the-board participatory decision-making would be promoted.

- . Exemptions would still be available for regulatory initiatives within the guidelines.
- . Ministries and agencies would not misdirect their energies into trying to obtain exemption.

Disadvantages:

- . There might be no net cost benefit in requiring certain ministries or agencies to give advance notice.
- . There might be abuses in applying the regulatory exemption guidelines.

2. Require those ministries and agencies accounting for a majority of the regulations (say 90%) to give advance notice.

Advantages:

- . The net cost benefit of the ANS would likely be greater.
- . Intervention with the ministries and agencies doing very little regulating would be minimized.

Disadvantages:

- . The number of regulations passed by an agency does not necessarily reflect the impact of those regulations. There are still interested parties who should have advance notice.
 - . Ministries and agencies might misdirect their energies into trying to obtain exemption status.
 - . Identification of the regulators to be exempted could be difficult.
3. Phase-in ministries and agencies by beginning the ANS with those ministries and agencies accounting for approximately 90% of the regulations and add the rest within a reasonable time limit (say three years).

Advantages:

- . The main actors would help to fine-tune the system.
- . The other ministries and agencies would be brought into a smooth running system and thus would not incur as much of the beginning costs of getting the system underway.

- . There would be less maneuvering by ministries and agencies to be excluded if eventual inclusion were to be required.

Disadvantages:

- . There may be a decreased net cost benefit in including the lesser regulators.

The burden of developing an ANS should be on the ministries and agencies accounting for the majority of regulations. At the same time, the aim of the ANS in allowing participation in decision-making should be met regardless of how many regulations are passed by that regulator.

RECOMMENDATION

5. PHASE IN ANS WITH THOSE MINISTRIES AND AGENCIES ACCOUNTING FOR APPROXIMATELY 90% OF THE REGULATIONS AND ADD THE REST BY THREE YEARS.

F. Content of the notice

Both the U.S. Agenda and Canadian Federal Agendas have detailed description of the included departments and their proposed initiatives. Ontario already publishes a detailed description of its ministries and agencies in its KWIC Index to Your Ontario Government Services.

The U.S. Agenda and Canadian Federal Agenda have some provision for impact analysis and a review of existing regulations.

The federal Agenda includes both of these because each has been independently authorized by Treasury Board.⁵

At this time, Ontario cabinet submissions are required to follow certain guidelines.⁶ These guidelines set out the need for economic impact evaluation. As well, the impact of the initiative on women and Native persons must be noted on all Cabinet submissions. Specific impact of an initiative on small business is not addressed.

There is no current procedure for a regular review of existing regulations in Ontario. The last flurry of activity in this appears to have been in 1981. Since there is no such procedure, listing in the Agenda is not possible.

The policy options are:

1. The content of the advance notice or regulatory initiatives should be based on the federal Agenda model and should include:
 - . identification and brief description of each ministry or agency.

- . table of contents
- . identification and description of the initiative
- . unique identification number for each initiative
- . designation if new item in agenda
- . legal authority where applicable
- . contact person
- . completed matters
- . index
- . caveat

Advantages:

- . All relevant information about regulatory initiatives would be in one place.
- . Consistency with the federal Agenda disclosure would help users of both Federal and Ontario Agendas.

Disadvantages:

- . Producing a detailed Agenda would be time-consuming and expensive.
- . Such a publication might unnecessarily duplicate much of the information already contained in Ontario's KWIC Index or available via informal channels.

2. A much slimmer "bare-bones" document should be produced. Such a document should be listed by ministry or agency and would include only a one-line description of the regulatory initiative with the name and telephone number of the contact person.

Advantages:

- . Such a document would be less costly and time-consuming to produce.
- . There would not be duplication of information already accessible.

Disadvantages:

- . Without details the document would be so general as to give no additional meaningful information.

RECOMMENDATION

- 6a. THE CONTENT OF THE ADVANCE NOTICE OF REGULATORY INITIATIVES SHOULD BE BASED ON THE FEDERAL AGENDA MODEL AND SHOULD INCLUDE:
 - . IDENTIFICATION AND BRIEF DESCRIPTION OF EACH MINISTRY OR AGENCY
 - . TABLE OF CONTENTS
 - . IDENTIFICATION AND DESCRIPTION OF THE INITIATIVE

- . UNIQUE IDENTIFICATION NUMBER FOR EACH INITIATIVE
 - . DESIGNATION IF NEW ITEM IN AGENDA
 - . LEGAL AUTHORITY WHERE APPLICABLE
 - . CONTACT PERSON
 - . COMPLETED MATTERS
 - . INDEX
 - . CAVEAT
- 6b. WHERE ECONOMIC IMPACT ANALYSIS HAS BEEN DONE A SUMMARY OF THE ANALYSIS SHOULD BE DISCLOSED IN THE AGENDA.
- 6c. ANY IMPACT ON WOMEN AND NATIVE PERSONS SHOULD BE DISCLOSED IN THE AGENDA.
- 6d. THE ONTARIO GOVERNMENT SHOULD STUDY THE REQUIREMENT OF AN IMPACT ANALYSIS OF INITIATIVES ON SMALL BUSINESS. SUCH ANALYSIS, IF REQUIRED, SHOULD BE DISCLOSED IN THE AGENDA.
- 6e. WHERE A MINISTRY OR AGENCY IS CONTEMPLATING A CHANGE TO THE ORIGINAL PROPOSAL AS A RESULT OF INPUT RECEIVED OR OTHER REASONS, THERE SHOULD BE DISCLOSURE OF THE REVISED INITIATIVE.

G. Form of the notice

In the section on the costs of the Federal Regulatory Agenda the various alternatives with corresponding costs are set out. The most expensive form of notice is the one currently being used - that of publishing the Agenda as a supplement to the Canada Gazette.

The American ANS requires notice in the Federal Register (the Gazette's counterpart) 60 days prior to finalizing the regulation. In addition, notice in the Federal Agenda is required in those situations set out in Executive Order 12291 and the Regulatory Flexibility Act.

The policy options are:

1. Require notice in the Ontario Gazette of regulatory initiatives when begun and no later than 60 days before finalizing.

Advantages:

- . Every initiative is captured on a timely basis.
- . The Ontario Gazette has a large readership and already publishes notice of finalized regulations.

Disadvantages:

- . Accessibility of the advance notice is reduced because interested parties would have to search through each weekly Gazette in order to find the required information. This would be time-consuming and frustrating.
 - . The identification of when to give advance notice of a policy consideration or research would be difficult and much abuse of system would be possible.
2. Publish a regular Regulatory Agenda as a supplement to the Ontario Gazette.

Advantages:

- . There would be an established readership.
- . All the information would be compiled in one place making it easily accessible.
- . An easily storable book for handy reference would be produced.
- . Identification of initiatives at a specific point in time would not be difficult.

Disadvantages:

- . Because of the special Gazette requirements for type-setting, paper, etc. the costs might be quite high.

3. Contract out the publishing and marketing of a regular Agenda.

Advantages:

- . Based on the Federal model, the costs would be less than those incurred in producing a Gazette Supplement.
- . Control over the format would still be maintained by the government.
- . An easily storable book for handy reference would be produced.
- . Identification of initiatives at a specific point in time would not be difficult.

Disadvantages:

- . It might not be government policy to contract out such an undertaking.
 - . Readership would have to be established as there would be no "built-in audience".
4. Create a computer data base that would be easily accessible by use of a modem. The entries could be updated as incurred and no later than semi-annually.

Advantages:

- . Based on the Federal model, the costs would be less than those incurred in producing a Gazette Supplement.
- . Hard copy of only that information desired need be saved.
- . There would be more flexibility in designing the format because no compliance with Gazette standards would be required.
- . Retrieval of information would be quite simple.
- . The information would be current.
- . They would be no need to produce individual department agendas.

Disadvantages:

- . Not all interested parties have computers or modems on their computers.
- . There would be uncertainty about which computer information service would be used.

The situation in Ontario must be more closely examined in order to determine whether it matches up with the federal situation with respect to Gazette restriction, respective costs, availability of a computer information system. If there is a good correspondence, the benefits in using a computer data base must be seriously considered.

Although not every interested party may have a computer, most would, and those that do not, would have access through libraries and groups that do.

RECOMMENDATION

- 7a. THE ONTARIO GOVERNMENT SHOULD DETERMINE THE COSTS OF PUBLISHING A SUPPLEMENT TO THE ONTARIO GAZETTE, OF HAVING A PRIVATE COMPANY PRODUCE THE AGENDA, AND OF MAKING THE AGENDA AVAILABLE ON A COMPUTER INFORMATION SERVICE.
- 7b. IF IT IS FOUND THAT THE FEDERAL COMPARISON OF COSTS IS VALID IN ONTARIO, ONTARIO SHOULD CREATE A COMPUTER DATA BASE THAT IS EASILY ACCESSIBLE BY USE OF A MODEM. UPDATES TO THE INFORMATION SHOULD BE MADE AS INCURRED AND NO LATER THAN SEMI-ANNUALLY.
- 7c. IF THE GOVERNMENT DECIDES TO PUBLISH A REGULATORY AGENDA IN BOOK FORM, SERIOUS CONSIDERATION SHOULD BE GIVEN TO HAVING THE AGENDA CONTRACTED OUT TO THE PRIVATE SECTOR FOR PUBLISHING AND MARKETING.
- 7d. THERE SHOULD BE NO REQUIREMENT FOR NOTICE IN THE GAZETTE PRIOR TO FINALIZING THE INITIATIVE.

H. Frequency

Both the Canadian Federal Agenda and U.S. Agenda are published semi-annually. This frequency is not too often to be a burden and yet often enough to provide timely information to interested parties. As stated earlier, if a computer information system is used, updates could be made to the system as incurred.

RECOMMENDATION

8. THE ONTARIO ADVANCE NOTICE OF PROPOSED INITIATIVES (AGENDA) SHOULD BE PRODUCED SEMI-ANNUALLY. IF THE NOTICE IS PRODUCED IN A COMPUTER INFORMATION BASE, THE DATA COULD BE UPDATED THROUGHOUT THE YEAR AND SHOULD BE REQUIRED TO BE UPDATED AT LEAST SEMI-ANNUALLY.

I. Distribution and Marketing

The distribution and marketing would depend on the form of the ANS. The price for the Agenda should bear some relation to the costs incurred in producing it. There should be a threshold imposed on the selling price to prevent it from being too expensive and therefore out of reach of many interested parties.

Federal departmental excerpts of the Federal Regulatory Agenda are currently made available at a reduced fee. This has increased the net cost of the Agenda. If the Agenda were put on a computer information system, separate publication should be discontinued.

The marketing must ensure that Gazette readers, lawyers, (interested parties), other government departments, and academics become aware of the advance notice. Use of individual ministry and agency mailing lists should help to alert all these parties.

RECOMMENDATION

- 9a. THE AGENDA OR ACCESS TO IT SHOULD BE SOLD AT A PRICE REFLECTING THE COSTS OF PRODUCING THE AGENDA WITH A THRESHOLD TO PREVENT IT BEING TOO EXPENSIVE.
- 9b. MARKETING SHOULD MAKE USE OF THE INDIVIDUAL MAILING LISTS MAINTAINED BY MINISTRIES AND AGENCIES.

J. Administration

Both the Federal and American governments have a central coordinating body that implements and monitors the ANS. The Federal Office of Regulatory Reform is within the Federal Treasury Board. Once the concept of a centralized ANS were accepted, a centralized coordinating office would become necessary.

RECOMMENDATION

10. THERE SHOULD BE A CENTRALIZED COORDINATING OFFICE APPOINTED TO INITIATE, IMPLEMENT AND MONITOR THE ANS.

K. Enforcement

There is no formal enforcement of the federal ANS in Canada. It is felt that general ministerial accountability to Cabinet is adequate to ensure proper compliance with the Federal Agenda. It would appear to be working although there is no statistical evidence supporting this claim (See p.12 of this report).

In the United States, Administrative Procedures Act 5 U.S.C. 553 (d) sets out the requirement that no rule will be effective unless compliance to 5 U.S.C. 553 was made not less than 30 days before its effective date.

This type of enforcement would only be possible in an ANS requiring notice of initiatives when begun rather than notice on a semi-annual basis.

Given a semi-annually produced Agenda, the policy options are:

1. Departments and agencies should be required to show the ANS coordinator compliance with the ANS prior to the registration of any regulation. Only after approval by the ANS coordinator should the Registrar of Regulations be permitted to register the regulation. Where notice in the Agenda is not made, written reasons for the omission should be given.

Advantages:

- . This type of enforcement would deter ministries and agencies from circumventing the ANS.
- . This type of enforcement would provide information upon which to base a statistical evaluation of the ANS.
- . A means of ministerial accountability would be provided.

Disadvantages:

- . There would be increased complexity to administrative procedures.
 - . No evaluation would be provided for policy and research.
 - . Departments and agencies might not accept this intervention.
2. There should be no formal enforcement of the ANS and the Canadian model should be followed.

Advantages:

- . There would be less intervention with departments and agencies.
- . The simplicity of the ANS would encourage its acceptance by departments and agencies.

Disadvantages:

- . It would be more difficult to evaluate the system.
- . Accountability of the ministries and agencies would be weakened.
- . The system would not be perceived by interested parties as being as effective as it should be.

Without an effective means of enforcement there could be much waste in the costs incurred in setting up and running an ANS. The central aim of facilitating participation by interested parties in the decision-making would not be perceived as being met.

RECOMMENDATION

11. MINISTRIES AND AGENCIES SHOULD BE REQUIRED TO SHOW THE ANS COORDINATOR COMPLIANCE WITH THE ANS PRIOR TO THE REGISTRATION OF ANY REGULATION. ONLY AFTER APPROVAL BY THE ANS COORDINATOR SHOULD THE REGISTRAR OF REGULATIONS BE PERMITTED TO REGISTER THE REGULATION. WHERE NOTICE IN THE AGENDA HAS NOT BEEN MADE, WRITTEN REASONS FOR APPLYING AN EXEMPTION SHOULD BE REQUIRED.

L. Design of the ANS

One important lesson Ontario should learn from the Federal experience is to encourage active participation by the regulating ministries and agencies at the earliest planning stage. Early active involvement of the Minister's office would ease future acceptance of an ANS. In addition the central ideal of an ANS to encourage participation by interested parties in the decision-making would be promoted in the example set in development of the ANS itself. This should ease

RECOMMENDATION

12. MEMBERS OF THE MINISTER'S OR AGENCY HEAD'S OFFICE SHOULD BE INVOLVED IN THE PLANNING STAGE OF AN ANS FOR ONTARIO.

M. Type of Comment

The advance notice should provide for a response from interested parties by way of written submissions and should not require oral hearings. Public hearings for all proposed regulatory initiatives would result in unnecessary costs being imposed on the ministries and agencies.

RECOMMENDATION

13. THE ANS SHOULD PROVIDE FOR WRITTEN COMMENT OR DIRECT CONTACT TO THE PERSON LISTED IN THE AGENDA. MANDATORY PUBLIC HEARINGS SHOULD NOT BE REQUIRED FOR ALL PROPOSED REGULATORY INITIATIVES.

VIII CONCLUSION

This paper has discussed the introduction of an Advance Notice System for proposed regulatory initiatives in Ontario. The central aim of such a system is to promote the democratic ideal of participation in government decision making by interested parties. Such a system encourages the public perception of a government which is "open, compassionate and competent".¹

In designing and implementing an ANS for Ontario, many decisions must be made. A summary of recommendations follow.

1. ONTARIO SHOULD DEVELOP AND IMPLEMENT AN ADVANCE NOTICE SYSTEM (ANS) FOR PROPOSED REGULATORY INITIATIVES. (p.33)
2. THE ANS SHOULD BE CENTRALIZED (p.36)
3. THE GOVERNMENT SHOULD IMMEDIATELY AUTHORIZE AN ADVANCE NOTICE SYSTEM OF PROPOSED REGULATORY INITIATIVES BY CABINET DIRECTIVE WITH A COMMITMENT TO FORMALIZE SUCH A SYSTEM IN LEGISLATION BY THREE YEARS (p.40)
- 4a. THE ONTARIO ANS SHOULD PROVIDE ADVANCE NOTICE OF PROPOSED REGULATORY INITIATIVES AS DEFINED

4b. THE ONTARIO ANS SHOULD INCLUDE AN EXEMPTION
CLAUSE FOR MATTERS OF EMERGENCY,
FEDERAL-PROVINCIAL OR INTERNATIONAL RELATIONS
- IMPLICATIONS AND ECONOMIC AND PROVINCIAL
SECURITY. THERE SHOULD NOT BE WIDE DISCRETION
GIVEN TO MINISTRIES AND AGENCIES IN APPLYING
EXEMPTIONS. (p.45)

4c. WHERE AN EXEMPTION FROM ADVANCE NOTICE IS
APPLIED TO AN INITIATIVE, AS SOON AS IT IS
FEASIBLE THEREAFTER, NOTICE SHOULD BE MADE OF
THAT INITIATIVE AND REASONS SHOULD BE STATED OF
WHY THERE WAS AN EXEMPTION. (p.46)

5. PHASE IN ANS WITH THOSE MINISTRIES AND AGENCIES
ACCOUNTING FOR APPROXIMATELY 90% OF THE
REGULATIONS AND ADD THE REST BY THREE YEARS.
(p.49)

6a. THE CONTENT OF THE ADVANCE NOTICE OF REGULATORY
INITIATIVE SHOULD BE BASED ON THE FEDERAL
AGENDA MODEL AND SHOULD INCLUDE:

- . IDENTIFICATION AND BRIEF DESCRIPTION OF EACH
MINISTRY OR AGENCY
- . TABLE OF CONTENTS
- . IDENTIFICATION AND DESCRIPTION OF THE
INITIATIVE
- . UNIQUE IDENTIFICATION NUMBER FOR EACH
INITIATIVE
- . DESIGNATION IF NEW ITEM IN AGENDA

- . CONTACT PERSON
- . COMPLETED MATTERS
- . INDEX
- . CAVEAT. (p.52-3)

- 6b. WHERE ECONOMIC IMPACT ANALYSIS HAS BEEN DONE A SUMMARY OF THE ANALYSIS SHOULD BE DISCLOSED IN THE AGENDA. (p.53)
- 6c. ANY IMPACT ON WOMEN AND NATIVE PERSONS SHOULD BE DISCLOSED IN THE AGENDA. (p.53)
- 6d. THE ONTARIO GOVERNMENT SHOULD STUDY THE REQUIREMENT OF AN IMPACT ANALYSIS OF INITIATIVES ON SMALL BUSINESS. SUCH ANALYSIS, IF REQUIRED, SHOULD BE DISCLOSED IN THE AGENDA. (p.53)
- 6e. WHERE A MINISTRY OR AGENCY IS CONTEMPLATING A CHANGE TO THE ORIGINAL PROPOSAL AS A RESULT OF INPUT RECEIVED OR OTHER REASONS, THERE SHOULD BE DISCLOSURE OF THE REVISED INITIATIVE. (p. 53)
- 7a. THE ONTARIO GOVERNMENT SHOULD DETERMINE THE COSTS OF PUBLISHING A SUPPLEMENT TO THE ONTARIO GAZETTE, OF HAVING A PRIVATE COMPANY PRODUCE THE AGENDA, AND OF MAKING THE AGENDA AVAILABLE

- 7b. IF IT IS FOUND THAT THE FEDERAL COMPARISON OF COSTS IS VALID IN ONTARIO, ONTARIO SHOULD CREATE A COMPUTER DATA BASE THAT IS EASILY ACCESSIBLE BY USE OF A MODEM. UPDATES TO THE INFORMATION SHOULD BE MADE AS INCURRED AND NO LATER THAN SEMI-ANNUALLY. (p.58)
- 7c. IF THE GOVERNMENT DECIDES TO PUBLISH A REGULATORY AGENDA IN BOOK FORM, SERIOUS CONSIDERATION SHOULD BE GIVEN TO HAVING THE AGENDA CONTRACTED OUT TO THE PRIVATE SECTOR FOR PUBLISHING AND MARKETING. (p.58)
- 7d. THERE SHOULD BE NO REQUIREMENT FOR NOTICE IN THE GAZETTE PRIOR TO FINALIZING THE INITIATIVE. (p.58)
8. THE ONTARIO ADVANCE NOTICE OF PROPOSED INITIATIVES (AGENDA) SHOULD BE PRODUCED SEMI-ANNUALLY. IF THE NOTICE IS PRODUCED IN A COMPUTER INFORMATION BASE, THE DATA COULD BE UPDATED THROUGHOUT THE YEAR AND SHOULD BE REQUIRED TO BE UPDATED AT LEAST SEMI-ANNUALLY. (p.59)
- 9a. THE AGENDA OR ACCESS TO IT SHOULD BE SOLD AT A PRICE REFLECTING THE COSTS OF PRODUCING THE AGENDA WITH A THRESHOLD TO PREVENT IT BEING TOO EXPENSIVE. (p.60)

9b. MARKETING SHOULD MAKE USE OF THE INDIVIDUAL MAILING LISTS MAINTAINED BY MINISTRIES AND AGENCIES. (p.60)

10. THERE SHOULD BE A CENTRALIZED COORDINATING OFFICE APPOINTED TO INITIATE, IMPLEMENT AND MONITOR THE ANS. (p.61)

11. MINISTRIES AND AGENCIES SHOULD BE REQUIRED TO SHOW THE ANS COORDINATOR COMPLIANCE WITH THE ANS PRIOR TO THE REGISTRATION OF ANY REGULATION. ONLY AFTER APPROVAL BY THE ANS COORDINATOR SHOULD THE REGISTRAR OF REGULATIONS BE PERMITTED TO REGISTER THE REGULATION. WHERE NOTICE IN THE AGENDA HAS NOT BEEN MADE, WRITTEN REASONS FOR APPLYING AN EXEMPTION SHOULD BE REQUIRED. (p.64)

12. MEMBERS OF THE MINISTER'S OR AGENCY HEAD'S OFFICE SHOULD BE INVOLVED IN THE PLANNING STAGE OF AN ANS FOR ONTARIO. (p.65)

13. THE ANS SHOULD PROVIDE FOR WRITTEN COMMENT OR DIRECT CONTACT TO THE PERSON LISTED IN THE AGENDA. MANDATORY PUBLIC HEARINGS SHOULD NOT BE REQUIRED FOR ALL PROPOSED REGULATORY INITIATIVES. (p.65)

NOTES

ii EXECUTIVE SUMMARY

- 1 This was identified as one of four "value premises for assessing the regulatory process" by the Economic Council of Canada, Responsible Regulation, An Interim Report, Minister of Supply and Services Canada (Ottawa: November 1979). p. 130-31.
- 2 David R. Peterson's Speech of July 2, 1985, p.. 5

II THE CURRENT REGULATORY PROCESS BY SECTION IN ONTARIO

- 1 Donald L. Revell, "Rule-Making in Ontario", (1982) 16 Law Society of Upper Canada Gazette 340-374.
- 2 A computer search of statutes, not involving bylaws found only three statutes with a 'notice and comment' procedure. The search was done on August 15, 1985 by the Information Services department of the Ministry of Industry, Trade and Technology on the Statutes of Ontario data base prepared and supplied by QL Systems Limited. The search consisted of looking for all statutes containing the words "notice", "proposed", and either "regulation" or "amendment."

IV EVALUATION OF ANS'S IN PLACE IN OTHER JURISDICTIONS

A) ANS in Canada

- 1 Departments of Agriculture; Communications; Consumer and Corporate Affairs; Energy, Mines and Resources; Environment; Fisheries and Oceans; Health and Welfare; Indian Affairs and Northern Development; Labour; National Revenue (Customs and Excise); Transport. The agencies are Atomic Energy Control Board, Canadian Radio-Television and Telecommunications Commission, Canadian Transport Commission, and National Energy Board.
- 2 Regulatory Agenda, Supplement to The Canada Gazette, May 25, 1985, p3.
- 3 Ibid, p.3.

B) ANS in United States

- 1 Administrative Procedures Act, 5 U.S.C. 601-612.
- 2 Ibid.

- 3 Mark Schoenberg, Executive Director of the U.S. Regulatory Information Service Center.
- 4 For a selection of current literature reviewing regulatory reform see T.B. Clark, M.H. Kusters, and J.C. Miller III, eds., Reforming Regulation, American Enterprise Institute for Public Policy Research (Washington DC: 1980); R.E. Litan and W.D. Nordaus, Reforming Federal Regulation, Yale University Press (New Haven: 1983); G.O. Robinson, E. Gellhorn, H.H. Bruff, The Administrative Process, 2nd ed., West Publishing Co. (St. Paul: 1980); J.T. O'Reilly, Administrative Rulemaking: Structuring, Opposing, and Defending Federal Agency Regulations, McGraw-Hill (Colorado Springs: 1983); T.O. Sargentich, "The Reform of the American Administrative Process: The Reform of the American Administrative Process: The Contemporary Debate" (1984) Wisconsin Law Review, 385-442; J.T. Scholz, "Reliability, Responsiveness, and Regulatory Policy" (Mar/Apr 1984) 44 Public Administration Review 145-153; U.S. House Committee on the Judiciary. Subcommittee on Administrative Law and Government Relations. Regulatory Reform Act-Supplement: hearings. June 8-July 28, 1983 on J.R. 2327, Washington DC 20515. Questionnaire and responses relating to the rulemaking procedure of selected independent regulatory agencies.

V DESCRIPTION OF ONTARIO'S HISTORY WITH RESPECT TO ANS

- 1 Royal Commission Inquiry into Civil Rights
J.C. McRuer, Commissioner, Report Number One, 1968.
- 2 Commission on Freedom of Information and Individual Privacy. Carlton Williams, Chairman Research Publication 9, 1979. Rule-Making Hearings: A General Statute for Ontario? David J. Mullan, p. 10
- 3 Commission on Freedom of Information and Individual Privacy. Carlton Williams, Chairman. 1980. Public Government for Private People. Volume 2, Chapter 23, p.412.
- 4 Standing Committee on Regulations and Other Statutory Instruments, First Report 1983, p.20
- 5 Martin Tolchin, "Curb on Powers in U.S. Agencies Voted in Senate", New York Times, March 25, 1985, A1.
- 6 Standing Committee on Regulations and Other Statutory Instruments, First Report 1984, p.16.

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VI IDENTIFICATION OF PRINCIPLES TO BE CONSIDERED IN ANY IMPROVEMENT OF THE REGULATORY PROCESS

- 1 This was identified as one of four "value premises for assessing the regulatory process" by The Economic Council of Canada, Responsible Regulation, An Interim Report, Minister of Supply and Services Canada (Ottawa: November 1979), p. 30-31.

VII POLICY OPTIONS AND RECOMMENDATIONS

- 1 Based on a Statutes of Ontario data base search performed on August 15, 1985 for legislation. This search excluded legislation which produce bylaws as subordinate legislation since the judicial history of advance notice with respect to bylaws has been different from other forms of subordinate legislation. (See Note 2 in Section II).
- 2 Martineau v. Matsqui Institution Inmate Disciplinary Board, (1978) 1 S.C.R. 118, 14 N.R. 285, 33 C.C.C. (2d) 366, 74 D.L.R. (3d) 1
- 3 Regulatory Agenda Supplement to the Canada Gazette, May 25, 1985 p.3.
- 4 Ibid, p.4.
- 5 Treasury Board Policy Directive 1977-47 authorizes federal departments to carry out periodic evaluation of all departmental activities, including regulatory activities. Chapter 4980 of the Government of Canada Administrative Policy Manual requires departments to apply a Socio-Economic Impact Analysis in certain circumstances.
- 6 Cabinet Office, Cabinet Submissions, guidelines for Preparing Policy proposals, Legislation and Regulations, February 1979.

VIII CONCLUSION

- 1 David R. Peterson's Speech of July 2, 1985, p.5.

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